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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 530

GARDENS OF FAITH, INC.,
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

RAYMOND F. CUSHING AND KATHRYNE R. CUSHING,
Petitioners,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

JOHN Y. MERRELL
821 Transportation Building
Washington, D. C. 20006
Counsel for Petitioners

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

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REPLY BRIEF FOR PETITIONERS

In reply to respondent's brief, petitioners ask the Court to consider the following:

1. Respondent asserts (Brief 5) that "Cushing's refusal to give up control did not prevent all parties from receiving stock to evidence their interests." This ignores the finding of the Tax Court that Murray and Mettee at

first insisted that they be given sufficient stock to control the corporation in return for their investment (21),[1] and undisputed testimony that Murray and Mettee were not interested in acquiring any stock unless it represented control of the corporation (109, 110). The Tax Court further found that Cushing's principal problem was to obtain financing for the property, but that he was unsuccessful in negotiations with a number of investors who were interested in financing a corporation in which they would hold a controlling stock interest, and that Cushing insisted upon control because he wanted to be assured that funds would be set aside for development expenses and for perpetual care of the cemetery (19). Under the circumstances of the arm's length bargaining (28), Murray and Mettee were not willing to accept stock for their funds.

2. Respondent distinguishes this case from *Commissioner* v. *Brown*, 380 U.S. 563, on the grounds that "the sale of land to Gardens was clearly not at arm's length" (Brief 8). The Tax Court found that the "negotiations which resulted in the issuance of the certificates of indebtedness were conducted at arm's length" (28). Also, respondent contends that there "is no evidence that Gardens would have entered into such a transaction with outsiders on such terms" (Brief 8). Murray and Mettee were outsiders, unrelated and unknown to Cushing, who represented Gardens, prior to the arm's length negotiations here involved.

3. Respondent contends if Gardens lacks funds to pay the corporate tax, it is only because these funds have been withdrawn from the corporation by its stockholders (Brief 7). If this were a withdrawal of funds by stockholders, there would be no question of the right of the Commissioner to proceed against such stockholders as

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[1] Reference is to petitioners' printed appendix in the Court below unless otherwise indicated.

transferees. But the funds were received as a result of good faith bargaining in which the recipients gave value and there is no suggestion of fraud. Moreover, the right of the individuals to the funds is recognized by the law of the State of Maryland. *Gregory* v. *Chapman*, 119 Md. 495, 87 Atl. 523.

5. Respondent concedes that Gardens cannot pay the tax liability under the Tax Court's decision by asserting, "the corporation's assets are undoubtedly sufficient to pay at least part of the tax liability . . ." (Brief 7, footnote 3). Gardens has disclosed its assets to collection officials of the Internal Revenue Service, Baltimore, Maryland. By inquiry to that office, respondent could readily ascertain that the part payment of tax liability referred to in his brief will be but a fraction of the tax liability involved. Even this part payment will be collectable only if respondent is willing to assert its rights ahead of other creditors of Gardens, who are in no way responsible for the transactions under consideration in this case.

6. The Court of Appeals' decision has not and, in and of itself, will not prevent the certificate holders from receiving payments based on a percentage of burial spaces sold. (Brief 7, footnote 3). Until the Commissioner takes action to collect a tax which Gardens cannot pay, thus causing the insolvency of the corporation, Gardens is obliged by law to make these payments. If and when such action is taken, then the situation of the various interested parties will be as discussed at pages 8 to 12 of the petition.

7. Respondent ignores the fact that the tax liability of the certificate holders who received the funds in question is reduced substantially as a result of the decision below. (See Petition 9, Par. C and footnote 8).

CONCLUSION

For the reason stated here and in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN Y. MERRELL
821 Transportation Building
Washington, D. C. 20006
Counsel for Petitioners

October, 1965